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MAY 23 1956
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1955

No. 856

COMMONWEALTH OF VIRGINIA,

Respondent,

against

E. R. DAUGHERTY, JR., EUGENE STITH, WILLIAM B. STITH, AMBROSE STITH, SR., AMBROSE STITH, JR., JOHN M. PRICE, MARK STITH, LEROY PARHAM, CLEVELAND STITH and CURTIS COLEMAN,

Petitioners.

PETITIONERS' REPLY BRIEF

I

The Constitutional Question

The opposing brief argues that the petitioners, "at no stage of the proceedings below or in their petition for a writ", alleged that the Virginia statute is unconstitutional (p. 7).

The position of each of the petitioners separately considered is, as made clear in our brief, that he has been denied rights under the federal Constitution by reason of *the application* of the state statute in such wise as to

incriminate him by his mere presence. (Petitioners' brief, p. 9.)

Specifically, each petitioner submits that they "were being denied their liberties under the due process clause of the Fourteenth Amendment of the Constitution of the United States" and under those other constitutional guaranties of "liberty" which are embraced therein.

This claim was duly made in the Trial Court. (Petitioners' brief, p. 6.) It was one of the "Errors Assigned" upon appeal to the Virginia Supreme Court. It has been argued in Points I and II of the petition for writ of certiorari.

Violations of the federal Constitution by the judgment of the state courts are, we submit, involved; and hence this Court has review jurisdiction.

> *Copperweld Steel Co.* v. *Industrial Commission of Ohio*, 324 U. S. 780, 785;
> *Wolfson & Kurland*, Jurisdiction of the Supreme Court of the United States, Sec. 11, p. 24.

II

Presence in the Picket Line

The respondent argues (p. 7) that "this unruly group of men" cursed the workers in the mill and then threw rocks at them, in violation of the state statute.

Each petitioner separately submits that as to him there was not one particle of probative evidence connecting him with any act of violence.

Nor is there one shred of evidence that any one of them, with the exception of John M. Price, did any cursing. What he said was, "You all are no God damned white man." This, it is conceded, is not "drawing room" or

"parlor car" language, but neither reason nor the state statute confines those in a picket line to such language. (*McWhorter* v. *Commonwealth*, 191 Va. 857, 865; 63 S. E. 2d 20, 24.)

Each petitioner expressly invokes the constitutional principle which was left open for future decision in *Cole* v. *Arkansas*, 338 U. S. 345, 352, and which becomes applicable where there are involved liberties of expression and assembly and those rights to fairness essential where one is in jeopardy of fine and jail.

This constitutional principle has, *since our petition and brief were filed*, been applied by the United States Court of Appeals for the District of Columbia in *Garment Workers Union* v. *NLRB*, in a decision handed down May 3, 1956 (38 LRRM 2061).

There the Board had denied reinstatement to numerous employees because of incidents of violence occurring during a strike. In so doing, the Board said (23 U. S. Law Week, p. 2290):

> "Nor is the right to strike impaired by our decision. We do not hold, as stated in the dissent, that strikers who are themselves blameless are responsible for the lawlessness of strangers. But we do say that strikers have no right to protection when they, at the very least, welcome the aid of criminal elements who took over their strike and desecrated it with violence and terrorism. * * * We do not suggest, as the dissent states, that the strikers could have purged themselves only by abandoning their picketing. There were other avenues open to them by which they could have disavowed the misconduct. They chose none of them. We fail to see that the requirement that strikers keep their strike within legal bounds abridges their right to strike."

The U. S. Court of Appeals set aside this decision by the Board (38 LRRM 2061; 24 U. S. Law Week 2513). It said, in language much in point here (38 LRRM 2065):

> "The Board says that the strikers erred when they continued picketing during the 'violent strike' and failed to repudiate and denounce violence which was 'committed on their behalf.' From these two factors, the Board concludes that the strikers 'welcomed, approved and ratified' the misconduct and therefore forfeited their right to relief.
>
> "*A conclusion of ratification drawn from mere failure to abandon picketing would curtail an important statutory and constitutional right.* Curtailment of this right is justified only when violence has 'given to the picketing a coercive effect whereby it would operate destructively as force and intimidation.' *Milk Wagon Drivers* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 298, 7 LRRM 310 (1941). As the Union points out, the Board made no finding that the picket line itself had 'a coercive effect,' or that the picketers themselves contributed to the violence.
>
> "Nor can a conclusion of 'ratification' rest on the strikers' failure to disassociate themselves from misconduct by 'admonishment, denunciation, or public pronouncement.' Aside from the question whether these terms suggest a meaningful course of conduct that the strikers may have elected, we think *they were under no obligation to disavow misconduct which they did not initiate and with which they are not shown to have been connected, directly or indirectly. United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 395 (1922). And their silence provides no rational basis for inferring that they acquiesced in the wrongs of others with whom no agency relationship is shown. *United Electrical Workers* v. *National Labor Relations Board*, 96 U. S. App. D. C. 46, 51, 223 F. 2d 338, 343, 36 LRRM 2176 (1955), makes clear that such a relation-

ship is an essential prerequisite to the inference which the Board seeks to draw from the strikers' silence." (Emphasis ours.)

The alien doctrine of guilt by association is excluded by our American jurisprudence and by various constitutional guaranties, such as the rights of free assembly and free speech and those other canons of decency and fair play inherent in the whole concept of due process.

The position of each petitioner here is that the doctrine of guilt by association is at the bottom of the application made of the Virginia statute in his case; that such application would jeopardize the constitutional right to picket by putting everyone in the picket line at the penal hazard of misconduct by some individual member thereof; and that it would convert into criminal guilt a failure immediately to withdraw from picketing and to make disavowal.

Such considerations invoke Due Process, as to which this Court has said in *Rochin* v. *California*, 342 U. S. 165, 169:

> "Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.' *Malinski* v. *New York*, *supra*, at 416-417. These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and con-

science of our people as to be ranked as fundamental,' *Snyder* v. *Massachusetts*, 291 U. S. 97, 105, or are 'implicit in the concept of ordered liberty.' *Palko* v. *Connecticut*, 302 U. S. 319, 325."

Respectfully submitted,

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